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Personal Harms and Political Inequities

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FOREWORD: PERSONAL HARMS AND POLITICAL INEQUITIES

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When we think back to where the legal battle for gender equality and the rights of gay people stood a century ago, we see that, in fact, there was not much of a battle. Indeed, advocates for change were seldom triumphant. A survey in 1900 would have shown that American women were twenty years away from obtaining the right to vote,[1] were unfit to be lawyers according to the U.S. Supreme Court,[2] and were nowhere near being eligible-let alone required-to serve on juries.[3] The survey would also have revealed a wide-ranging web of federal and state laws and policies that treated lesbians, gay men, and transgendered people as sexual psychopaths and dangerous perverts requiring incarceration.[4]

Fast forward to today and the picture becomes more complicated. In some

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1. *See* U.S. CONST. amend. XIX; *see also* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (women not entitled to vote by virtue of citizenship and attendant "privileges" under Fourteenth Amendment Privileges and Immunities Clause).

2. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1892) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

3. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (dictum) (exclusion of women from grand jury service not violative of criminal defendant's equal protection rights); Hoyt v. Florida, 368 U.S. 57, 62-63 (1961) (exemption of women from obligatory jury service upheld because "woman is still regarded as the center of home and family life" and should, therefore, have "privilege" to decline unless jury service is "consistent with her own special responsibilities"), *overruled*, Taylor v. Louisiana, 419 U.S. 522, 701 (1975); Mississippi v. Hall, 187 So. 2d 861, 863 (Miss. 1966) ("The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131-32 (1994) (women were excluded from jury service in many states "well into the present century").

4. *See, e.g.*, Boutilier v. INS, 387 U.S. 118, 121-23 (1967) (history of exclusion of lesbian and gay noncitizens under "psychopathic personality" rubric delineated); Utah v. Cooper, 201 P.2d 764, 767 (Utah 1949) ("Homosexual practices may result either from congenital homosexuality, psychopathic homosexuality, or excessive sexual vigor expressed in homosexual practices in the absence of opportunity for heterosexual relations. Congenital homosexuals, and to a certain extent, psychopathic homosexuals, may be wholly unresponsible for their homosexual acts. They are motivated by biological and physiological factors which may be beyond their power to combat or control. And while such persons cannot be left to prey upon society, and particularly upon young children, the wisdom of declaring their conduct to be criminal may be seriously questioned. In the light of advanced biological and medical knowledge, the legislature might well provide for their confinement in sanitaria for necessary treatment."); *see also* William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419, 430 (1997) (as late as the early 1960s, consensual sodomy could result in a felony conviction with requisite psychiatric evaluation as "sexual psychopath" and institutionalization exposing "many inmates [to] a horror chamber of electroshock and mental torture and for some a life sentence").

respects, we have entered a new and better jurisprudential world with respect to gender and sexuality.[5] For example, the tenor and substance of the Supreme Court's 1996 decision in *Romer v. Evans*,[6] striking down Colorado's anti-gay Amendment 2, is light years way from the Court's hostile decision in 1986 sustaining Georgia's sodomy prohibition.[7] No longer do we have a Supreme Court mockingly treating a gay person's constitutional claim as "at best facetious."[8] Similarly, in many states, we have moved beyond the times in which

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5. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (gender classifications must serve "exceedingly persuasive" governmental interest that is "not hypothesized or invented post hoc in response to litigation," and that does not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130-31 (1994) (equal protection violation found when state permitted peremptory challenges to potential jurors on basis of sex because it served "to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (citations and internal quotations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C.A. § 2000e-2(m) (West, WESTLAW through Oct. 19, 1999)); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (rape of pre-operative transsexual prisoner constituted gender-motivated crime under Title III of Violence Against Women Act when offense was motivated in part by prisoner's gender identity); Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1999) ("[T]he story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups."), *cert. granted*, 120 S. Ct. 865 (2000).

6. 517 U.S. 620 (1996).

7. *Compare* Romer v. Evans, 517 U.S. 620, 636 (1996) (state constitutional amendment prohibiting state and local entities from enacting legislation or policies to protect lesbians and gay men from discrimination not rationally related to any legitimate governmental purpose), *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (state criminal sodomy statute upheld because no fundamental right to engage in "homosexual sodomy" existed); *cf.* Baker v. Vermont, 744 A.2d 864, 885 (Vt. 1999) (no rational government interest supported withholding marriage benefits from same-sex couples; "equal protection of the laws cannot be limited by eighteenth-century standards") (quoting Brigham v. Vermont, 692 A.2d 384, 395 (Vt. 1997)); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) (no equal protection violation found when state refused to issue marriage license to same-sex couple because refusal did not embody "irrational or invidious discrimination"; "institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").

8. Bowers v. Hardwick, 478 U.S. 186, 194 (1986). *Romer* was actually not the first Supreme Court decision to distance itself from *Bowers*'s deprecating tone. A year prior to the *Romer* decision, while upholding parade organizers' First Amendment right to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from Boston's St. Patrick's Day Parade, the Court treated GLIB with respect and specifically did not endorse the organizers' discriminatory message. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 570, 581 (1995) ("GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own;" "[o]ur holding today rests not on any particular view about the [organizers'] message"). Another notable and early exception to the sort of judicial hostility toward gay claimants embodied in *Bowers* can be found in the First Amendment arena, in which claims brought by lesbians and gay men have prevailed for many years with some, though not perfect, consistency. *See* One, Inc. v. Olesen, 335 U.S. 371 (1958) (summarily reversing Ninth Circuit's determination that "homosexual magazine" was "obscene and filthy and . . . therefore non-mailable matter") (citing One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957)); *see also* Gay & Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1547-48 (11th Cir. 1997) (First Amendment violation found when Alabama statute prohibited any college or university from

courts regularly expressed utter shock or disgust that gay people would seek to have our relationships and families recognized; in this new era, our claims typically, though not always, receive serious consideration and often prevail.[9]

In addition to reflecting recent social and cultural change, some of these positive developments are attributable to coordinated efforts by litigators and plaintiffs to remind courts of the real people whose lives are affected by the cases before them, and, on a broader scale, to demonstrate the human consequences that inevitably follow a legal determination concerning a gender or sexuality issue. Taking lessons from the behind-the-scenes deliberations in *Bowers v. Hardwick*—during which Justice Powell, the swing vote to uphold Georgia's criminal sodomy law, asserted that he knew no gay people[10]—many of us litigating on behalf of lesbians and gay men conscientiously include, by record evidence or amicus briefs, information about who gay people are and the harm imposed upon them by the challenged measure.

With that in mind, our legal team in *Romer v. Evans* presented the testimony of individual plaintiffs who could demonstrate in a compelling way how an abstract measure like Colorado's Amendment 2, which forbade all state and local government entities from prohibiting discrimination against gay people, caused direct and personal harm.[11] Even in our U.S. Supreme Court brief, which made only limited reference to trial testimony, we recounted the story of plaintiff Angela Romero, a Denver police officer who lost her position working as a school resource officer and then was refused back-up support when assigned to patrol duty.[12] And, although the Court did not reference Romero's individual experience, it plainly recognized, both at oral argument and in its opinion, the wide range of discrimination for which lesbians and gay men might seek redress from government.[13]

But, despite these markers of change, we often find ourselves revisiting the

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spending public funds to promote "lifestyle or action" prohibited by sodomy law because it constituted impermissible viewpoint discrimination as applied to student gay and lesbian group); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988) (First Amendment violation found when lesbian and gay student group denied funding by student senate because denial constituted content-based restriction on student speech); Gay Students Org. v. Bonner, 509 F.2d 652, 659-60 (1st Cir. 1974) (First Amendment prevented university from barring events held by gay student organization).

9. *Compare, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."), *and* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (denial of marriage license to same-sex couples did not violate equal protection guarantees and did not constitute sex discrimination), *with* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (plurality) (denial of marriage license to same-sex couples constituted sex discrimination, triggering strict scrutiny under state constitution), *and* Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (reservation of benefits of marriage to opposite-sex couples violated state constitution's common benefits clause).

10. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521 (1994).

11. *See* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 27-28 (1998).

12. *See* Respondents' Brief at 5 n.6, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), *available in* 1995 WL 417786.

13. *See* Romer v. Evans, 517 U.S. 620, 630 (1996).

same territory on which we have been battling for years, gaining traction in some cases and, in others, sliding dangerously back. At the same time as the Supreme Court has recommitted to rigorous review of governmental sex discrimination,[14] it has constricted the parameters of sexual harassment under Title VII.[15] Similarly, even as the Court has affirmed a woman's right to terminate her pregnancy, the quality of that right, in conjunction with the legal standard for evaluating its infringements, has been the subject of near-constant litigation before the high court.[16] Likewise, some federal appellate and district courts have applied *Romer* fully, while others could not be more cramped in the construction of that landmark opinion.[17]

State courts, too, have provided us with mixed, though increasingly favorable, developments in gender and sexuality jurisprudence.[18] Since the mid-1980s,

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14. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (sex-based classifications may survive equal protection challenge only when the government can demonstrate "exceedingly persuasive" justification).

15. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.").

16. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992) (trimester approach utilized in *Roe v. Wade* rejected and replaced with "undue burden" test); Roe v. Wade, 410 U.S. 113 (1973) (woman's right to terminate pregnancy in first trimester established); Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999) (ban on dilation and extraction procedures, most widely used to perform second trimester abortion, invalid as undue burden on women seeking second trimester abortion), *cert. granted*, 120 S. Ct. 865 (2000).

17. *Compare* Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) (equal protection violation found when lesbian was selectively arrested and prosecuted for drunk driving because officers' actions were motivated by animus based on her perceived sexual orientation), *cert. denied*, 523 U.S. 1118 (1998), *and* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (Utah 1998) (equal protection violation found when public school removed teacher from volleyball coach position because of teacher's sexual orientation: "If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity [regarding teacher's sexual orientation], it is necessarily irrational and under *Romer* and other Supreme Court precedent, it provides no legitimate support for the School District's decision."), *with* Equality Found. v. Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997) (no equal protection violation found when Cincinnati Amendment, which was almost identical to Colorado's unconstitutional Amendment 2, barred local government from providing "protected status" to gay people), *cert. denied*, 525 U.S. 943 (1998), *and* Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997) (en banc) (Georgia attorney general's withdrawal of employment offer after learning of lesbian attorney's planned religious marriage to another woman sustained against First Amendment and equal protection challenge; "*Romer* is about people's condition; this case is about a person's conduct. And, *Romer*, is no employment case. Considering (in deciding to revoke a job offer) public reaction to a future Staff Attorney's conduct in taking part in a same-sex 'wedding' and subsequent 'marriage' is not the same kind of decision as an across-the-board denial of legal protection to a group because of their condition, that is, sexual orientation or preference."), *cert. denied*, 522 U.S. 1049 (1998).

18. Public discourse and policy today also differ significantly from even a decade ago. In 1990, for example, the concept of domestic partnership was virtually unknown outside of small circles. Just a few employers offered benefits to the domestic partners of their employees, and each additional public or private entity to do so was seen as breaking new ground. Ten years later, while the issue of marriage for same-sex couples has become a contentious battleground, domestic partnership registries and benefits programs are fairly widespread, and the concept is discussed frequently and with familiarity, if not always with complete clarity, by elected officials and the media, and within the private sector. *See* KIM I. MILLS & DARYL HERRSCHAFT, HUMAN RIGHTS CAMPAIGN FOUNDATION, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 19 (1999), *available in*

lesbian and gay rights litigators have turned to state courts anticipating that we would find, if not a warm reception, at least not the icy one given by the Supreme Court in *Bowers*.[19] In fact, all three cases directly addressing the rights of lesbians and gay men to come before the Court since *Bowers* originated in state court.[20] In many cases, that hope of a fair and understanding hearing has been born out, as state courts have construed their state constitutions to invalidate anti-sodomy statutes, among other bias-infected "morality" measures.[21] In other cases, however, courts have, with apparent ease and little analysis, refused to recognize the inequity of a wide range of discriminatory actions.[22] Unfortunately for many lesbian and gay parents, family law particularly highlights this tension; while some courts staunchly reject the use of a parent's lesbian or gay identity as a basis for determining child custody or visitation, others have continued to rely on offensive, false presumptions about the harm gay parents might cause to their children.[23]

<http://www.hrc.org/worknet> (1999 survey identified nearly 3000 private companies, educational institutions and governments that offered domestic partner coverage). Likewise, owing in part to the national debate begun in 1992 about service by open lesbians and gay men in the military, both the news media and popular culture have witnessed (and contributed to) an exponential jump in the visibility of lesbians and gay men. Yet, the viciousness and power with which the radical right has used its substantial media outlets to vilify gay people and feminists has simultaneously reached previously unimaginable heights.

19. State legislatures, too, have become an important focal point for activists seeking to pass bills (or kill hostile legislation) concerning reproductive freedom, lesbian and gay equality (particularly in the marriage and family law arena), and the rights of transgendered people. *See* NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, 199 CAPITAL GAINS AND LOSSES: A STATE BY STATE REVIEW OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND HIV/AIDS-RELATED LEGISLATION IN 1999 (1999).

20. *See* Romer v. Evans, 517 U.S. 620, 636 (1996); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group, 515 U.S. 557, 570 (1995); Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (2000). *But see* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543 (1987) (challenge to organization's use of term "Gay Olympics" analyzed as trademark case without addressing gay affiliation of organization and event).

21. *See, e.g.*, Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992) (statute criminalizing consensual same-sex sexual conduct violated state constitution's privacy and equal protection guarantee); Gryzcan v. Montana, 942 P.2d 112 (Mont. 1997) (statute criminalizing consensual same-sex sexual conduct violated state constitution's privacy guarantees); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (same); *cf.* Powell v. Georgia, 510 S.E.2d 18 (Ga. 1998) (statute criminalizing oral and anal sex for all persons in Georgia violated state constitution's privacy guarantee), *reh'g denied* (Dec. 18, 1998).

22. *See, e.g.*, Able v. United States, 155 F.3d 628 (2d Cir. 1998) (no equal protection violation found in "Don't Ask, Don't Tell" statute's bar on military service by open lesbians and gay men); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (FBI's decision not to hire lesbian because of her sexual orientation did not violate equal protection guarantee because agency had rational basis to conclude that gay people presented particular security risk); Florida Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993) (en banc) (Florida statute prohibiting gay people from adopting sustained), *aff'd in part and rev'd in part on other grounds*, 656 So. 2d 902 (Fla. 1995); Opinion of the Justices, 530 A.2d 21 (N.H. 1987) (New Hampshire statute prohibiting gay people from adopting or serving as foster parents sustained) (citing N.H. REV. STAT. ANN. § 170-B:4 ("any individual . . . not a homosexual" allowed to adopt)), *superseded by statute*, 1999 N.H. Laws 18 (H.B. 90) (restriction repealed).

23. *Compare* Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (gay father denied custody), *and* Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998) (children removed from custody of gay father based in part on father's relationship with another man), *and* Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (lesbian

In addition to the courts, state and local governments have found themselves participating in this jurisprudential evolution. Through their role as key players in developing the framework of laws providing protections related to gender and sexuality, these government entities have frequently found themselves in court. Among many examples, municipalities have been at the forefront of enacting domestic partnership registries and benefits legislation and, consequently, at the forefront of legal battles defending these measures from lawsuits.[24]

The one constant in this wide-ranging explosion of sexuality and gender jurisprudence is, as noted above, the intertwining of the deeply personal and political aspects of challenges to sexuality- and gender-based inequality and harm. Indeed, the conception of personal "problems" as political issues, popularized during the Women's Liberation Movement in the 1970s, could not be more fitting to the subject of this *First Annual Review of Gender and Sexuality Law*. Acknowledging the essentially personal nature of sexuality, in particular, Justice Blackmun observed in his *Bowers* dissent that "sexual intimacy is a 'sensitive, key relationship of human existence, central to . . . the development of human personality.' "[25] At the same time, legal challenges to harms based on gender and sexuality are fundamentally political, in that opposition to a restriction based on one's sex, gender, or sexual orientation unavoidably involves challenging the law's intolerance or incorporation of bias, often cloaked in the guise of so-called "popular morality."

Elena Picado, Lambda Legal Defense and Education Fund's lead plaintiff in our challenge to Arkansas's statute criminalizing consensual private sexual relations between same-sex couples, perfectly illustrates how the personal and political are inextricably connected in gender and sexuality litigation. Each day, Picado lives with the risk that a court might use the fact that she is a lesbian and a violator of the sodomy law as a basis for taking her children away from her.[26]

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mother denied custody based in part on "social condemnation" of "active lesbianism"), *with* Boswell v. Boswell, 721 A.2d 662 (Md. 1998) (restriction on gay father's visitation removed because no showing that father's sexual orientation or his relationship with his partner caused harm to children), *and* Inscoe v. Inscoe, 700 N.E.2d 70, 81 (Ohio Ct. App. 1997) (gay father retained custody following former wife's challenge; court recognized that "parent's sexual orientation, standing alone, has no relevance" to custody determination and trial court "must disregard adverse impact on the child that flows from society's disapproval of a parent's sexual orientation").

24. *See, e.g.*, Air Transp. Ass'n v. City & County of San Francisco, 992 F. Supp. 1149, 1164-65 (N.D. Cal. 1998) (most provisions of San Francisco ordinance requiring contractors to treat married and unmarried employees equally in provision of benefits sustained); City of Atlanta v. Morgan, 492 S.E.2d 193 (Ga. 1997) (Atlanta's domestic partnership benefit policy for city employees sustained); Connors v. City of Boston, 714 N.E.2d 335 (Mass. 1999) (mayoral executive order extending group health insurance benefits to domestic partners of city employees violated Home Rule Amendment to Massachusetts Constitution because it conflicted with statutory definition of dependent).

25. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

26. *See* Larson v. Larson, 902 S.W.2d 254, 256 (Ark. Ct. App. 1995) (denial of custody to lesbian mother upheld based in part on her "deviant sexual activity"); Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Cracraft, J., concurring) (denial of custody to lesbian mother affirmed: "The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and

Each day, too, a prosecutor could decide to bring charges against her and her partner because the law criminalizes their loving relationship. But, at the same time as Picado fights to rid herself of the sodomy law hanging ominously over her like a sword of Damocles ready to drop, she is also tackling that law's public pronouncement, which harms her and all lesbian and gay Arkansans, that gay people throughout the state are second-class citizens, undeserving of the same respect and protection for their intimacy as their heterosexual neighbors.

A similar sword actually did fall on Lambda's clients Tyrone Garner and John Lawrence in Houston, Texas, when they were dragged out of Lawrence's apartment in the middle of the night for allegedly engaging in consensual anal sex. According to the District Attorney, the state's aim in bringing the power of its sodomy law into Lawrence's bedroom was to "promote family values" and "discourage immoral conduct."[27] By refusing to pay their fine quietly and walk away, Garner and Lawrence have taken on not only the state's gross invasion of their personal privacy, but also its use of the law as a sledgehammer with which to force conformity to its purported moral code.[28]

This sort of intertwining of personal and political dimensions extends well beyond suits to overturn direct prohibitions of sexual relations. When teenagers in a gay-straight club press for the right to meet freely in their local high school[29] or a gay assistant scoutmaster fights his expulsion from the Boy Scouts of America,[30] their direct focus is, of course, on the obstacle to equality imposed by the law or policy at issue. At the same time, their lawsuits are vitally important as a challenge to these measures' reinforcement of the insidious message that gay people are second-class citizens, unentitled to full participation in "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[31] Indeed, every time a battered woman seeks a restraining order against a batterer, a lesbian or gay parent stands before a judge and fights to keep custody of her or his children, or a woman pursues a civil rights remedy for gender-motivated violence that she has suffered,[32] these individuals join their personal battle with the essentially political demand that society allow us all to exist without our freedom and equality made contingent on our ability or desire to conform to social mandates regarding sex, gender, and sexuality.

The wide sweep of gender and sexuality litigation and its complex underpin-

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criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases where . . . the custodial contestant has declared her fixed determination to continue that course of illegal conduct for the rest of her life . . . .").

27. Appellee's Brief at 4, Lawrence v. Texas, Nos. 14-99-00109-CR & 14-99-00111-CR (Tex. App. June 17, 1999).

28. *See* Lawrence v. Texas, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417 (Tex. App. June 8, 2000) (Texas homosexual sodomy statute held unconstitutional under state equal rights amendment).

29. *See* East High Gay/Straight Alliance v. Board of Educ., 81 F. Supp. 2d 1166 (D. Utah. 1999).

30. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

31. Romer v. Evans, 517 U.S. 620, 631 (1996).

32. *But see* United States v. Morrison, 120 S. Ct. 1740 (2000) (Gender-Motivated Violence Act invalidated under both Commerce Clause and Fourteenth Amendment Enforcement Clause).

nings make this *First Annual Review of Gender and Sexuality Law* invaluable for practitioners, advocates, scholars, and courts as a map of the rapidly changing landscape, as well as a guide to future developments. Its broad coverage—including constitutional law as it relates to gender and sexuality, as well as legal developments concerning the family, education, employment discrimination and violence—cuts across the most significant areas in which the relationship between gender, sexuality, and the law is hotly contested. By distilling doctrinal developments in the *Annual Review*'s text and including thorough descriptions and analyses of relevant cases in the footnotes, the *Annual Review* offers to all interested in gender and sexuality law a comprehensive treatise-type resource to elucidate this jurisprudential evolution.

At the same time, its commitment to incorporating cutting edge developments and putting them in context makes the *Annual Review* an excellent legal resource for advocates, pro bono attorneys, and others as a spring board or supplement for on-line research and as a solid foundation when electronic research is unavailable. Moreover, because so much of sexuality and gender jurisprudence is evolving at the state and local level, the *Annual Review*'s inclusion of these developments informs readers of some of the newest legal theories and how they are being received in court.

As the *Annual Review* makes clear, the tension between the law's use as a vehicle to ensure equality and its use to enforce inequality is not a new one. Nor is it a tension likely to dissipate any time soon. Virtually every effort to combat institutionalized bias-whether based on race, disability, or any other aspect of personhood-has experienced the Jekyll and Hyde dimensions of law as an alternating safe haven and dangerous port. So too, the courageous individuals who stand up for themselves, personally, and for their communities, politically, have a long battle ahead in this area that so dramatically affects the intimate aspects of people's lives and the public determinants of social relations and legal rights.